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Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 249.

GEORGE A. PETTIBONE, APPELLANT,
vs.
JASPER C. NICHOLS.

No. 250.

CHARLES H. MOYER, APPELLANT,
vs.
JASPER C. NICHOLS.

No. 251.

WILLIAM D. HAYWOOD, APPELLANT,
vs.
JASPER C. NICHOLS.

BRIEF AND ARGUMENT FOR APPELLANTS.

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Counsel for Appellants.

(20,191, 20,192 and 20,193.)

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BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT OF THE CASE.

The appellant, Charles H. Moyer, is now, and for some years last past has been the president of the Western Federation of Miners, a labor organization

having its headquarters in the city of Denver, in the state of Colorado.

The appellant, William D. Haywood, is now, and for some years last past has been the secretary-treasurer of the said organization, and

The appellant, George A. Pettibone, is an honorary member of said organization, and was at ~~one~~ time a member of its executive board.

Each one of the appellants has appealed from an order denying him any relief under a habeas corpus proceeding instituted by him and carried to final judgment in the Circuit Court of the United States for the District of Idaho.

Each one of the appellants has likewise sued out and perfected a writ of error from this court to the Supreme Court of the state of Idaho, from a final judgment rendered in a habeas corpus proceeding instituted by the respective appellants in that court. These latter causes are numbered on the docket of this court respectively as No. 265, No. 266, and No. 267, for the October term, 1906.

The questions presented by the above series of causes are the same, and a stipulation has been filed in those here on writ of error, that they, and each of them shall abide and be governed by the opinion and judgment of this court to be rendered in the foregoing causes.

The applications for writs of habeas corpus in both courts were founded upon the following conditions of fact:

On the 30th day of December, A. D. 1905, one Frank Steunenberg, ex-governor of the state of Idaho, then a resident of the town of Caldwell in the county

of Canyon, in that state, came to his death as he was returning home on the evening of that day, by the explosion of a bomb.

It is conceded that no one of the appellants and plaintiffs in error was present in the state of Idaho at that time, nor for some months prior thereto, in the case of Moyer, and some years prior thereto in the cases of Haywood and Pettibone. (Transcript, page 1, paragraph 2, sub. c.)

On the 12th day of February, 1906, one Owen M. Van Duyn, the regularly elected, duly qualified and acting county attorney of the county of Canyon, filed a sworn complaint in the office of the probate judge of Canyon county, charging the appellants and plaintiffs in error with the commission of the crime of murder against the person of said Frank Steunenberg, by reason of the discharge of said bomb. (Page 2.)

On the same day the probate judge issued his warrants of arrest against the appellants and plaintiffs in error. On the same day Mr. Van Duyn prepared a petition directed "To His Excellency the Governor of the state of Idaho," seeking a requisition on the governor of the state of Colorado, for the arrest of the appellants and plaintiffs in error in which he certified that the application for a requisition had not sooner been made because the evidence connecting the appellants and plaintiffs in error with the crime charged, had just been discovered. (Paragraph 7, page 4.)

At the same time he prepared and filed with the petition an affidavit in support thereof. (Page 5.)

In this affidavit Mr. Van Duyn took a solemn oath "that the said (appellants and plaintiffs in error) were in the state of Idaho on the date of the murder of said Frank Steunenberg," and that they were fugitives from the justice of the state of Idaho.

Upon the application and the affidavit so presented, the governor of the state of Idaho issued a requisition purporting on its face to be "pursuant to the provisions of the constitution and laws of the United States in such case made and provided." (Page 6.)

In this requisition he designated Mr. J. C. Mills, Jr., as the agent of the state of Idaho to receive the said appellants and plaintiffs in error as fugitives, pursuant to the request contained in the ninth paragraph of the application. (Pages 4, 6.)

It is charged in paragraph k of the second subdivision of the petition for the writ that in all of the acts and doings of the governor of the state of Idaho and of the county attorney of Canyon county, they were aided, counseled and advised by one James H. Hawley, an attorney at law, residing at Boise City. (Page 6.)

It is charged and admitted in paragraph f, that in each and every, all and singular of said proceedings, it was well known to the said Van Duyn, the said governor and the said Hawley, that in truth and in fact the petitioners for the writ were not, nor were any of them in the state of Idaho on the 30th day of December, A. D. 1905, nor at any time near that date, and so knowing the fact to be, the said Van Duyn, the said governor and the said Hawley conspired, confederated and agreed together and with each other, and

with other persons, to the petitioners unknown, to avoid the Constitution of the United States and the act of congress made pursuant thereto, which provide for the rendition of those who are fugitives from justice, only when those who are accused of an alleged crime were actually in the state where the alleged crime was alleged to have been committed, each in his own corporeal person, at the time of said alleged commission.

The terms of the conspiracy are then set forth. It is charged, in effect, that the governor, the prosecuting attorney and the special counsel, Mr. Hawley, were well aware of the terms of the constitutional provision and the act of congress and that in order to prevent the assertion of the rights of the petitioners in the state upon which the requisition was being made, it was agreed that Mills and Hawley should take the requisition to the governor of the state of Colorado and there enter into a further conspiracy with the governor of that state to use the forms of law for the purpose of kidnapping and forcibly taking the bodies of the appellants and plaintiffs in error from the state of Colorado and removing them to the state of Idaho in defiance of the courts of the state of Colorado. (Par. 2, sub. m, page 7.)

Mills and Hawley did arrive at the capitol of the state of Colorado on the 15th day of February at the hour of eleven o'clock in the forenoon, and on the same day they perfected the conspiracy with the governor of the state of Colorado, which had theretofore been agreed upon, between the governor of the state of Idaho and Van Duyn and Hawley. (Sub. n, par 2, page 7.)

This agreement contemplated the arrest of the appellants and plaintiffs in error, under circumstances which would, and did, prevent any application to the courts of the state of Colorado. The conspirators took no action on Thursday towards said arrest, no action on Friday following, nor until late in the evening of the night of Saturday, the 17th day of February, when long after the business of the day had closed, and the courts had adjourned and the judges thereof had departed to their homes and counsel, whose aid might have been invoked, were scattered, the bodies of the petitioners were secretly arrested and secretly and clandestinely hurried out of the state of Colorado.

During all of the time while these conspirators were perfecting their plan, the appellants and plaintiffs in error were engaged in their business, openly and above board, in said city, and could easily have been arrested at any time after the arrival of Mills and Hawley in said city. Moyer was arrested about 8:45 o'clock in the evening; Haywood was arrested about the hour of 9:30 o'clock, and Pettibone was arrested about the hour of 11:30 o'clock. They were taken to the county jail of the city and county of Denver, they were there incarcerated, and every precaution was taken to prevent their friends or their counsel from having any knowledge whatever of the fact of such arrest. (Par. 2, sub. o, page 8.)

It is charged, and by the demurrer admitted, that each one of the conspirators knew that if a writ of habeas corpus was issued and a hearing had thereon, the requisition would be unavailing and the prisoners would be discharged, and that all of the acts and proceedings were for the express purpose of preventing

any knowledge of their arrest or imprisonment, until after they could be gotten out of the state of Colorado, so that no writ could issue, and every precaution was taken so that if by any means a writ should issue, it would have been wholly disregarded by these conspirators and each of them.

Pending the arrest, steps were taken to provide a special train, which was secured, so that between the hours of five and six o'clock on the morning of the 18th day of February, the appellants and plaintiffs in error were taken by the agent of the state of Idaho, the adjutant general of the state of Colorado, his orderly and certain members of the militia of the state of Colorado, and they were put on board said train and forcibly removed from the state of Colorado, in defiance of their rights and of any judicial process, which might have been issued. (Paragraph 2, sub. s, page 9.)

For the purpose of avoiding any writ which might have been issued through any county in the states of Colorado or Wyoming, through which the said train ran, it was further provided that the train should make no stop at any considerable station on the line of travel, from the city of Denver to Boise city, but that it should proceed, and did proceed, with great and unusual speed, so accompanied by the said armed guards, consisting of the members of the militia of the state of Colorado acting under the personal orders and directions of the adjutant general of that state.

The bodies of the appellants were not taken before the probate judge of Canyon county, who had issued the original warrants for their arrest, upon the original complaints which had been filed as by law

required, but they were taken to Boise City, in another county, and there thrown into the penitentiary, a place for condemned felons only, and after being so thrown into said penitentiary they were placed in solitary confinement, in separate cells, where they remained for many days thereafter, allowed to communicate with no one, except upon one occasion, when their attorney was allowed to visit with them, but only under the personal supervision, and, part of the time, within the hearing of the warden of that penitentiary (sub. v, paragraph 2, page 9). The bodies of the appellants and plaintiffs in error remained in said penitentiary from the 19th day of February, 9 o'clock a. m., until the 13th day of March, when their custody was transferred to the sheriff of Canyon county, and they were removed to the county jail of that county. On the 23d day of February, the appellants and plaintiffs in error filed their petitions in the Supreme Court of the state of Idaho asking for a writ of habeas corpus to test the validity of their imprisonment, upon a statement of facts precisely similar to those set forth in the petition in this case. That court took jurisdiction, ordered the writ to issue, making the same returnable on the 1st day of March, and on that date the warden of the penitentiary filed a return, which is set forth on pages 10, 11 and 12 of the transcript. In this return the warden of the penitentiary claimed to be acting simply as the agent of the sheriff of Canyon county, the appellee herein, and on the day of the hearing upon the return and the answer thereto, which embraced the facts set forth in the petition, the respondent asked leave to file an amended and supplemental return, which

was allowed. This supplemental return showed that a grand jury, sitting in the county of Canyon, on the 7th day of March, did find an indictment for murder against the appellants and plaintiffs in error for the killing of the said Steunenberg. To the amended and supplemental return, an answer was filed admitting the truth of the matters and things therein stated, but denying the sufficiency thereof. Thereupon a motion was presented to strike from the answer all of those parts, matters and things hereinbefore and therein stated which related to the manner and method of obtaining the possession of the persons of the appellants and plaintiffs in error within the state of Idaho. An argument was heard in the Supreme Court on that motion, and it was taken under advisement.

On the 12th day of March, A. D. 1906, the Supreme Court of Idaho sustained the motion, dismissed the writs and remanded the prisoners. Thereafter, that court, speaking through Mr. Justice Ailshie, handed down its written opinion, which is printed herewith as an appendix to this brief.

On the 15th day of March, A. D. 1906 (page 16), the appellants and plaintiffs in error filed their petition for a writ of habeas corpus in the office of the clerk of the United States Circuit Court, sitting in and for the district of Idaho in the central division thereof, in which they reiterated the matters and things set up in their petitions for writs of habeas corpus to the Supreme Court of the state of Idaho, together with the action of that court, and thereby invoked the independent judgment of the Circuit Court of the United States, upon the unlawfulness of their de-

tention. The writ was allowed and issued (page 17) against Jasper Nichols, who, as it was alleged, was the real custodian of the prisoners at all times after their arrival within the state of Idaho, the warden of the penitentiary, Mr. Whitney, claiming to act simply as his agent in such detention. Thereupon Mr. Nichols filed his return, setting up the indictment which had been found by the grand jury (pages 19, 20, 21, 22 and 23).

Thereupon a stipulation was entered into that the matters and things set forth in the return should be considered as true, and that the petitions upon which the writs had been issued should be taken and considered and deemed to be the answers to the return, as fully, to all intents and purposes, as though the same were designated as answers to such return. (Page 24.)

Thereupon the respondent moved to strike out the answers as sham and irrelevant and demurred to them as immaterial. These motions and demurrers were heard together, and after such hearing the motions and demurrers were sustained, the writs were quashed and the prisoners were remanded. A bill of exceptions was allowed and filed, an appeal was taken, the petition for which was accompanied by an assignments of errors, the penalty of the bond was fixed, the bond was filed and transcripts were in due time lodged in this court, so that we now have here for the consideration of the court, three writs of error on three separate petitions, proceeding to final judgment in the Supreme Court of the state of Idaho, and three appeals from the order and decree on three separate

petitions made to the Circuit Court of the United States in and for the district of Idaho.

SPECIFICATIONS OF ERROR.

We specify as error, the rulings of the Circuit Court of the United States in the following particulars:

First. In sustaining the motion to strike out the answers to the return of the respondents.

Second. In sustaining the demurrers of the respondents to the answers of the plaintiffs in error.

Third. In quashing and dismissing the writ of habeas corpus theretofore issued in each of said causes, and

Fourth. In remanding the plaintiffs in error to the custody of the sheriff of Canyon county.

BRIEF AND ARGUMENT.

We have authority for saying that these cases are *sui generis*. The Supreme Court of the state of Idaho (see appendix) used this language, in their opinion:

> "No case has been called to our attention, and, in fact, we have been unable to find any instance where the prisoner has alleged as a ground for his discharge, a like state of facts to those set up in the answer in this case, and to which the motion is here directed."

It is safe to say that there is not in all the books a single instance of so flagrant a malfeasance of political and executive duty as that which this court is now called upon to consider.

Cases may be found where the executives of the different states have been imposed upon in the granting of requisitions; cases may be found where affidavits, which were false, in fact, have been filed, upon which requisition papers have been issued; cases may be found where private parties have kidnaped those who were charged with crime in another state and have forcibly removed them to that state; cases may be found where defendants have sought the aid of the courts of the demanding state in habeas corpus and have been denied, but no case has ever heretofore existed where the executives thereof, or either of them, have participated in and have been aware of the concoction of an affidavit which was false in fact, upon which to base a requisition proceeding, so that the courts of a demanding state may acquire jurisdiction of the person of one who was not in fact a fugitive from justice. We have here presented for the consideration and determination of this court for the first time, a state of facts which, under the opinion of the Supreme Court of the state of Idaho, authorizes the executive of that state to actually perpetrate a fraud upon the law, in order that the courts of Idaho may acquire jurisdiction of the persons of these defendants, which they would otherwise have never secured.

We have presented here, a state of facts showing that the governor of the state upon whom the demand was made, had full knowledge of the falsity of the

proceedings, and with such knowledge of that falsity, actually engaged in a conspiracy to remove citizens of his own state to another state, and actually furnished the military forces of his state to aid in the accomplishment of that purpose.

It is well for this court to pause and consider the enormity of the charge here made. The demurrer filed in the Circuit Court admits absolutely and without equivocation the charge in its entirety. A careful and diligent study of the constitutional provision governing the allowance of requisitions, the act of congress passed pursuant thereto, and the decisions of this court thereunder led the executive of the state of Idaho and his adviser to believe that, if as a matter of fact, the bodies of the petitioners could be brought within the state of Idaho, that the courts, state and federal alike, were powerless to inquire as to the method of their arrival, and so they conceived the idea, under certain decisions which will hereafter be analyzed, that they would foist the indignity upon the law, of a false affidavit and a false certificate purporting to conform with the requirements of the law as to matters of form, but in wilful derogation of its substance.

We are not confronted with a case of actual fugitives from justice. It can be readily understood that if one has committed a crime within a state, and has fled therefrom, that the law will not be very particular as to the means or the method by which his return to that state is insured. The law, however, in our judgment, will never wink at a fraud foisted upon itself, and especially is that true where that fraud is practiced by a sworn prosecuting officer and the chief

executive of a state. As this court has said: "No man in this country is so high that he is above the law. *No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.*"

United States vs. Lee, 106 U. S., 196-220; 27 L. Ed, 171-182; 1 Sup. Ct. Rep., 240.

Burton vs. United States, No. 539, decided May 21, 1906, 15th U. S. Sup. Ct. Adv. sheets, Oct. Term, 1905, pages 688-693.

Jurisdiction of the subject-matter in a court is one thing; jurisdiction of a person in any wise related to that subject-matter is quite another.

Pennoyer vs. Neff, 95 U. S., page 714; 24 L. Ed., 565.

One may exist without the other.

Our point is: That the jurisdiction of the persons of the defendants in the indictment named, was acquired by the District Court of Canyon county, through the wrongs and the frauds of the prosecuting officer of that county aided and abetted by the governors of the states of Idaho and of Colorado, through a conspiracy formed for that purpose.

A conspiracy is defined to be:

"The corrupt agreeing together of two or more persons to do, by concerted action,

something unlawful, either as a means or an end."

2 Bishop on Criminal Law, section 171.

Bishop hastens to explain in the following section, that "corrupt" in this definition, applies to an evil purpose, but not necessarily an intent to do what if accomplished by one alone, would be indictable, and that a like signification attaches to the word "unlawful."

Under this demurrer the prosecuting attorney of Canyon county and the governor of the state of Idaho contrived unlawful means to bring about what, by means of the contrivance was an unlawful end, to wit, the making of a false affidavit upon which the requisition proceedings were based.

Every one connected with the transaction knew that the affidavit charging these men with being present in the state of Idaho on the 30th of December was absolutely and unqualifiedly false. They knew that, without such an affidavit the law could not be invoked to secure a requisition, and they being officers of the law and charged with the execution of it, sought and used this means to secure a thing which was unlawful in itself, which thing they took unlawful means to secure.

SOME CONSTITUTIONAL GUARANTIES WHICH HAVE BEEN VIOLATED BY THE ARREST OF THESE APPELLANTS.

The fourth amendment to the Constitution of the United States provides that, "The right of the people

*to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated."*

This guaranty accompanied each of these appellants on the 17th day of February, 1906. It will be observed that the right consists in the security, that the security extends to the person, and that that security of the person is violated, if it is *unreasonably seized.* What is an unreasonable seizure? It is one which is not based upon the law; ergo, it is an unlawful seizure; it is one which is secured in violation of the law. The Constitution of the United States means exactly what it says, or it means nothing at all. If one may be seized in violation of it and in violation of an act of congress made thereunder, then it affords no protection and it is not worth the paper on which it is written. *The protection to the appellants was absolute, unless the seizure was in accordance with law. How can a seizure be said to be in accordance with law when every one connected with the seizure knows that the paper proceeding upon which it is founded is an absolute falsehood?* We are not unmindful of that line of decisions in this court which in effect declares that that the first ten amendments do not limit the powers of the states in respect to their own people, but operate on the federal government only, but not one of such decisions are applicable in a case like this where the only power that could lawfully interfere with the liberty of the appellants arises under and by reason of the Constitution of the United States and the act of congress passed in pursuance thereof. Ex parte Sawyer, 124 U. S., 200; 31 L. Ed., 402-408.

Clause 2, of section 2, of article 4 of the Constitution of the United States is as follows:

> "A person charged in any state with treason, felony or other crime *who shall flee from justice* and be found in another state, shall on demand of the executive authority of the state *from which he fled*, be delivered up, to be removed to the state having jurisdiction of the crime."

Let us consider this provision for a moment: There is a recognition in it, that a state may have jurisdiction of a crime and have no jurisdiction of the person.

When it has jurisdiction of the crime it may, under certain conditions, and those alone, lawfully acquire jurisdiction of the person.

Those conditions are, that the one who has committed the crime shall flee from justice, and one can not flee from justice who has never been in the state where the crime was committed, but even with the provision of the Constitution existing as it does, no means of a lawful character could be recognized for obtaining jurisdiction over the person, until the enactment of the statute, section 5278, R. S. U. S., which is as follows:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory *to which such person has fled*, and produces a copy of the indictment found, or an affidavit made

> before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic, by the governor or chief magistrate of the state or territory from whence the person *so charged has fled*, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

Unless the proceeding is in strict conformity with this statute, any seizure of the person made is in violation of a right guaranteed by the Constitution of the United States. It is no answer to say, that because private parties may seize without semblance of right and therefore jurisdiction of a court may attach in such a manner that it can not be detached, that the executive officers of a state may use the forms of law to destroy the substance of that law. *The jurisdiction of the Idaho court over these persons must depend upon its acquisition of the bodies of the persons by its own officers and by the executive officers of the state in strict conformity with the law, otherwise it has no jurisdiction at all.*

But if we are wrong in this, the question of its jurisdiction is immaterial, because the seizure was unreasonable, because it was unlawful, and being un-

lawful and therefore unreasonable, the Constitution of the United States guards that person as of the exact moment when it was unlawfully seized and the courts of the United States ought to restore that person to the exact condition in which it was when the laws of the United States were violated, both fundamental and statutory. There can be no escape from this conclusion, in consonance with either the law or the spirit of the Constitution or the act of congress.

It is no answer to say, that, if the defendants in the Idaho proceeding are guiltless, their innocence will be made to appear upon the course of the trial. *The provision of the Constitution guards them, guilty or guiltless, against any seizure by governmental officers at least, unless it is in strict conformity with the law.* Whether they be guilty or innocent, is not the question for determination and no right exists for its consideration.

It is clear, as we shall show by the authorities hereafter, that no provision of law exists for the extradition of one who is charged to have constructively committed an offense, in a state in which he was not present. *Why? The Constitution and the law guards even an offender in such a case as that against extradition.*

The Supreme Court of North Carolina, speaking upon this subject, in State vs. Hall, 115 N. C., 811; 28 L. R. A., 289, said:

> "What can be done to provide for this *casus omissus?* We may answer in the language of Spear: 'Nothing, by any extradition process, until there is some authority

of law for it. State statutes may be enacted to furnish a remedy not now supplied by either federal or state law.' Were the courts, without any semblance of right, to supply the legislative omission, it would be a criminal usurpation of authority, more pernicious to the public interests than the escape of, not two, but scores of criminals. Appellate courts can not deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation. * * Courts can not amend or override constitutions and statutes, and, upon the higher-law idea, anticipate dilatory legislatures by providing for the safety of the public in the event that anarchists should project deadly missiles across a state border. * * * If there is any foundation for apprehending that the disorderly elements of society are watching for opportunity to take life and destroy property, provided they can see a way of escape through the loopholes of defective laws, the representatives of the people must be trusted to meet, if not anticipate emergencies, as they arise. Neither actual nor possible consequences should deter judges from executing the law as it is plainly written. The *argumentum ab inconvenienti* when used to bring about a modification of a well-established principle of law, should be addressed to the law maker, whose province it is to provide a remedy for any evils growing

> out of its enforcement. Addressed to judges under such circumstances, it is an invitation or a temptation offered to violate their sacred obligation in order to appease the public. * * * The law which fails to provide for the extradition of a guilty man must be understood and adhered to, because it may be invoked as protection to the innocent, who are prosecuted without cause, *against the annoyance, expense and invasion of personal liberty involved in being extradited.*"

The demurrer confesses that the thing which was forbidden in the foregoing case, is exactly what has been done in the case at bar. The executive of Idaho and the prosecuting attorney of Canyon county, advised by that able and astute lawyer, the Hon. James H. Hawley, knew that no extradition law could be rightfully invoked to secure the persons of the defendants within the state of Idaho. They knew that if any extradition was granted, no matter how fair in form it might be on its face, any sort of an investigation by the courts, either federal or state, within the boundaries of Colorado, would necessarily set the prisoners at large.

Can it be possible that the Constitution of the United States governing extradition proceedings, is a protection to a prisoner within one state, when it is absolutely powerless in another? In other words, it is conceded, that if *habeas corpus* had been obtained from the United States Circuit Court for the District of Colorado, and it had been served, and re-

garded by the official brigands, who set in motion and carried out this proceeding, it would have resulted in the liberty of the prisoners, but because of the imaginary line constituting a state boundary, the federal courts, with like jurisdiction in the state of Idaho, are absolutely powerless to effect the same object.

There are some things which have been said by this court which might seem to sanction such a doctrine, but a careful analysis of what the court has said will demonstrate, we think, that it has never sanctioned and will not now sanction a proposition so monstrous. We shall have occasion to advert to this matter again when we come to the discussion of the authorities.

We claim that this arrest and the jurisdiction over the person which attached by reason of the arrest, is in violation of the fifth amendment to the Constitution of the United States, which provides, that no person shall be deprived of liberty, without due process of law.

Nothing can be added to the discussion of what constitutes "due process of law," by the writer of this brief. This great court has never been able to give any satisfactory definition of it, but it has contented itself by saying, in effect, that each case must be governed by its own peculiar circumstances and any definitions which may have been given are only of a general character and are only to be understood as applying to the facts of the particular case before the court.

A very full collation of the cases decided by this court and the definitions formulated in such cases, is

found in the 3rd volume of Words and Phrases, at pages 2227, et seq.

> "It is probably better to ascertain the intent and application of the phase 'due process of law' by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and the reasoning on which such decisions may be founded."
>
> Davidson vs. New Orleans, 96 U. S., 97, 104; 24 L. Ed., 616.

In Missouri Pac. R. Co. vs. Humes, 115 U. S., 512-519; 29 L. Ed., 463-465, it is said:

> "In England the requirement of due process of law, in cases where life, liberty and property were affected *was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law.'*

In Holden vs. Hardy, 169 U. S., 366, 42 L. Ed., 780-790, it was observed:

> "Due process of law implies at least *a conformity with the natural and inherent principles of justice.*"

In State vs. Ashbrook, 154 Mo., 375; 48 L. R. A., 265; 77 Am. St. Rep., 765, the Supreme Court of Missouri defined "Due process of law," "as the law of the land, designed to *protect and preserve the rights of the citizen against arbitrary legislation, AS WELL*

AS AGAINST ARBITRARY EXECUTIVE OR JUDICIAL ACTION."

The Supreme Court of New York said, in People vs. Adirondack Ry. Co., 160 N. Y., 225-238:

> Due process of law consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property."

The Supreme Court of Iowa, in the case of State vs. Hammer, 116 Iowa, 284-288, said:

> "Due process of law in its legal sense does not mean mere form."

The Supreme Court of Utah in Jenkins vs. Ballantyne, 8 Utah, 245-247; 16 L. R. A., 689-690, observed:

> "The term 'due process of law' includes ALL the steps essential to deprive a person of life, liberty or property. *It includes all the forms and acts essential to its application and to give effect to it.*"

We are aware, that, ordinarily speaking, if one is presented before a court, upon an indictment, and he is allowed a trial by jury, that due process of law is said to have been administered. We are aware, also, that, due process of law may consist in one form of trial in one state and another form in another, but we have yet to see a decision where any essential step in

the prosecution of a prisoner is violated, where it has been held that due process of law has taken place. We are aware, also, that there may be acts of independent parties, taken in connection with the prosecution of the case, for which the state is not responsible which would not violate due process of law where all of the acts of the state, in connection with the prosecution, were regularly and duly taken. But, we maintain, that these prisoners have not had due process of law, because it is conceded that the Constitution stood as their sufficient safeguard and protection in the state of which they were residents and citizens, but for the trick, subterfuge, conspiracy and outrage perpetrated upon their liberty by the connivance of the governors of the great states of Idaho and Colorado.

We submit that no candid mind can approve the course of those two governors. We submit that all right-thinking citizens turn with loathing and disgust from the action of the petty executives which deprived these citizens of the right to test the infringement of their liberty in the courts erected and maintained for that purpose. We submit that the Constitution of the United States does not stand for their protection in Colorado alone. It either stands for their protection at all times and in all places under a given set of circumstances, or it does not stand for their protection at all, and the guaranties therein contained in this and other provisions are worse than sounding brass or tinkling cymbals. They convey, in such case, high-sounding promises to the ear, only to break those promises to the heart. The Constitution, rightly construed, is not so. If it could have protected these men in Colorado, it is able to protect them in the state of

Idaho, and, in our judgment, this court will never say, nothwithstanding the lengths to which it has heretofore gone, in some of the cases, that the law may be trampled upon by the governors of two states, upon which to base a jurisdiction of the courts of one of them, over persons who are citizens of another.

Space will not permit, and it will serve no useful purpose, to pursue and analyze the decisions that have been rendered upon what constitutes due process of law. Suffice it to say, that, every essential step taken, must be in conformity with the law. The form of the the law can not be invoked to destroy its substance. A governor can not connive to procure, and procure knowingly, a wilfully false affidavit upon which to base requisition proceedings. He can not wrest from citizens of the United States, their liberty of person, upon any such wilful, deliberate, and flagitious violation of the law.

The arrest and detention of these prisoners is in direct violation of clause 2, of section 2, of article 4, of the Constitution of the United States, and section 5278, of the revised statutes, made in pursuance thereof.

Clause 2, of section 2, of article 4, is as follows:

> "A person charged in any state with treason, felony, or other crime, *who shall flee from justice* and be found in another state, shall, on demand of the executive authority of the *state from which he fled*, be delivered up, to be removed to the state having jurisdiction of the crime."

It needs no language of ours to construe this section. It has been exhaustively, authoritatively and finally determined by this court, that, in order to invoke the aid of this clause, there shall be an actual fleeing from justice; that one can not flee from the justice of a place where he has never been; that it is not sufficient to find him in another state, but he must be found in another state than that from which he fled, and that no one can flee from a state, within the meaning of this clause, unless he was actually, personally and bodily present in the state whose justice has been outraged. But, if there were any doubt upon that score, it was set at rest by the act of congress referred to, because the provision of the Constitution itself was not self-executing, and it required an act of congress to carry it into effect.

Kentucky vs. Dennison, 24 How,. 66-110; 16 L. Ed., 717-728.

This enactment is as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory *to which such person has fled*, and produces a copy of the indictment found, or an affidavit, made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territoroy from whence the person *so charged has fled*, it shall

> be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause a notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent *when he shall appear.*"

In People vs. Hyatt, originally decided by the Supreme Court of the state of New York in 172 N. Y., 176; 92 Am. St., 706, this court in 188 U. S., page 691-713, 47 L. Ed., page 657-662, said:

> "We have found no case decided by this court wherein it has been held *that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed.* We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, *in fact, fled therefrom.*"

In the case of

> Munsey vs. Clough, 196 U. S., 364; 49 L. Ed., 515,

the doctrine of the Hyatt case was reaffirmed with the statement, that, in every habeas corpus proceeding, based on the requisition stated, there were two things to be considered:

First. Whether the person demanded has been substantially charged with the crime and,

Second. Whether he is a fugitive from justice.

The first is a question of law; *the latter is a question of fact. Any warrant issued upon the latter is only presumptive*, which presumption, notwithstanding the regularity of the appearance of the papers, may be overthrown, "by contrary proof in a legal proceeding to review the action of the governor."

Later on in the case the court says:

> "When it is conceded (as the demurrer concedes it in this case), or when it is so conclusively proved, that no question can be made that the person was not within the demanding state when the crime is said to have been committed and his arrest is sought on the ground only of a constructive presence at that time in the demanding state, then the court will discharge the defendant."

These are the two latest enunciations of this court upon that subject and it is useless to cite the long line of authorities from state courts leading thereto, all of which are disregarded by the Supreme Court of the state of Idaho in the decision which it has rendered, together with an animadversion upon the decisions of this court, which we think would never have been made, thought or promulgated, if the question had arisen with respect to a requisition upon the governor of the State of New York for John D. Rockefeller, John Pierpont Morgan and Thomas F. Ryan. There was and is just as much authority

and just as much right to maintain a requisition for the three last named gentlemen in the case at bar as there was or is for these defendants, under the conceded facts of this case as they are written into the stipulated answer to the return.

Fancy, if you please, the governor of the state of New York honoring a requisition upon the concededly false affidavit, known by him to be false, for the arrest of those gentlemen. Fancy, if you can, the Supreme Court of the state of Idaho saying, after they had been gotten into that state, upon such a basis, that the courts, state and national, were powerless in the premises. Fancy the federal court of the state of Idaho declaring, that, because the writ of the governor of the state of New York was *functus officio* that therefore its arm was paralyzed. It may be that the process, under which jurisdiction exists in the District Court of Canyon county, in and for the state of Idaho, is lawful, but the jurisdiction of the person was acquired unlawfully and that jurisdiction exists upon an unlawful thing participated in by its prosecuting officer, a part of the machinery of the court itself, and any jurisdiction founded upon the wrong of the court or any officer of it can not be maintained. It is no answer to say, because no course has been prescribed by congress for the restoration of these men to the state of Colorado, that, therefore, the provision of the Constitution which protects them from arrest, without due process of law and against unreasonable seizure, can be violated.

It will stand conceded in this court, that if an opportunity had been given us to apply for a writ of *habeas corpus* in the state of Colorado or in any other

state than the state of Idaho, into which the prisoners were taken on their way to Idaho, that the courts, state and national alike, would have been bound to have enlarged them.

What is the magic thing which gives to these prisoners the benefit of the writ of *habeas corpus* in Colorado and Wyoming, if they had been allowed the opportunity to obtain it, which deprives them of it in the state of Idaho?

Is the liberty of the individual to be made the plaything and the foot-ball of one state in the Union, when it is protected in every other state?

Can the black art of conspiracy and the devils which it may raise, become so powerful as to paralyze the action of the federal judiciary and the state judiciary as well?

Let us look to the decisions to see whether or not this court has ever sanctioned any such proceeding.

Preliminarily, we will call attention to one or two of the decisions of the lower federal courts.

In the case of the State of Tennessee vs. Jackson, reported in 36 Fed Rep., page 258, Judge Key had this state of facts before him for consideration:

The defendant resided in the city of Chicago, Illinois; he sold the prosecutor a horse. The purchaser of the horse resided in Chattanooga, Tenn. The purchaser saw an advertisement in a Chicago newspaper offering the horse for sale and the trade was completed by correspondence; Jackson remaining all the while in Chicago and the purchaser in Chattanooga. The horse was shipped by rail to the purchaser and the price remitted by mail to Jackson. After the arrival of the horse at his destination and a

trial of his abilities and qualities, the purchaser claimed that the horse was worthless, and that the price paid had been obtained by false pretenses and he sued out a warrant against Jackson which was issued by a justice of the peace in Chattanooga. The matter was placed in the hands of a detective *who made affidavit that Jackson had been charged with committing the crime of obtaining money by false pretenses* against the state of Tennessee, and that he had fled from the state of Tennessee and was in the state of Illinois. The governor of Tennessee made requisition upon the governor of Illinois for Jackson, under the provisions of section 5278, Revised Statutes of the United States. Armed with these papers the detective went to Illinois, obtained a warrant from the governor of that state for the arrest of Jackson and arrested him and *hurried him off to Tennessee*, had him tried before a justice of the peace and committed to jail.

Jackson sued out a writ of *habeas corpus*. It was contended that the mailing of the letter containing the money in the postoffice at Chattanooga, addressed to Jackson at Chicago, was, in law, a delivery to Jackson and that in consequence, Tennessee had jurisdiction, and having jurisdiction *and the defendant being here*, NO MATTER HOW, THE AUTHORITIES OF THE STATE HAVE THE RIGHT TO RETAIN HIM IN CUSTODY FOR TRIAL.

That is exactly the contention in this case. This demurrer admits that the affidavit was false; that the requisition papers were a fraud; that habeas corpus, if obtained in Colorado, or Wyoming, would have been bound to enlarge these defendants, but they say,

we now have them in Idaho; they have been subjected to the jurisdiction of our courts, by reason of this false and fraudulent affidavit and requisition. What are you going to do about it? It remains for this court to say.

Judge Key said:

> "Jackson was not a fugitive. He had not in all his life been in Tennessee, had never fled from it, and his case did not fall within the positive terms of this law. *The oath of the detective was false and the governors of the two states imposed upon. The whole proceeding was a fraud upon the law.*"

In the case at bar the governors of the two states were not imposed upon; the demurrer admits that both of them knew that the affidavit was false and that one of them was a conspirator in the procuration of that false affidavit and the other one having knowledge of such conspiracy and such false affidavit, became a part of the conspiracy and lent himself to the overthrow of the provision of the Constitution and the statute made in pursuance thereof.

Judge Key said:

> "If this arrest and imprisonment are to be maintained, *the opportunities for wrong and abuse of this law will be great and widespread.* Commercial transactions are largely conducted by mail and by telegraph. If the seller at one end of the line and the buyer at

the other *with the aid of detectives*, in cases of dispute and controversy between them, are to be allowed, under such proceedings as these, *to have the citizens of one state carried to another state for trial, under the false allegation that the person charged has fled, instances of oppression may not be few.* It seems to me that the general government *can not stand by and see its laws so trifled with and abused.* * * * It seems to me that such authority should not be held to the seizure and removal of a citizen of its state, when such seizure and removal were procured by fraud, falsehood and imposition." (In this case unblushingly confessed to have taken place.)

We desire to advert briefly to,

In re Cook, decided in 49 Fed. Rep., 833.

In that case, which seems to have been much relied upon by the Supreme Court of the state of Idaho, it was decided that the executive warrant had spent its force, when the defendant was within the demanding state and held upon process regularly issued there.

That case, however, was different from the one at bar and proceeded upon a wholly different theory. Cook, as a matter of fact, was in Wisconsin on the day when the offense was committed. Cook had prescribed, authorized and was maintaining a course of proceeding upon the part of his servant, which would inevitably tend to the receipt of a bank deposit at a

time when Cook knew that the bank was insolvent. The case was taken to this court, and in 146 U. S., page 183, will be found its opinion.

This court did not sustain the doctrine of the lower court but it proceeded upon altogether a different theory, without, however, either approving or condemning the doctrine which had been announced. An examination of the record revealed that after Cook was arrested, upon the warrant of the governor of the state of Illinois, that he not only had an opportunity to, but as a matter of fact he did apply to the courts in Illinois for a writ of habeas corpus, which was decided adversely to him. He did not appeal from that decision or in any other way seek to question it, but he submitted himself to the jurisdiction of the officer and accompanied him to the state of Wisconsin. He remained in the state of Wisconsin several months after his arrest, quietly awaiting his trial. In due time the case came on for trial and after it had been proceding for some considerable time he then sought to avail himself of the privileges of the writ in the federal court sitting in Wisconsin.

In passing upon that case this court did not hold that it did not have jurisdiction, but it held that, there being circumstances to show that he had ample opportunity to apply for his writ, and that he did not do so until after the jury had been sworn and his trial begun, was of itself a special circumstance to indicate *that the federal court should not interpose at this time*. In other words, he had not exhausted his remedy in the state court; he had submitted himself to its jurisdiction, that jurisdiction was being

proceeded with and in the midst of it he sought to avail himself of the writ.

Mr. Justice Brown further said in the course of that opinion:

> "Some reasons are, however, suggested, for holding that, if he were not, in fact, a fugitive from justice and entitled to be relieved upon that ground, by the courts of the surrendering state, *he ought not to be deprived of that right by a forced deportation from its territory, before he could have an opportunity of suing out a writ of habeas corpus.* That question, however, does not necessarily arise in this case, since the record before us shows that he did sue out such writ before the Criminal Court of Cook county and acquiesced in such decision remanding him to the custody of the officer."

So we see that this case is far from an authority in favor of the detention of the prisoners in a case like the one at bar. Here the prosecution is charged in conjunction with the executives of the states of Idaho and Colorado, with a studious attempt to preclude the issuance of the writ in the first place and to disobey it, if it should be issued, in the second place, so as to give to the courts of Idaho a jurisdiction over the person of these defendants, which it otherwise could never have obtained. That jurisdiction over the person resulted from an obvious infraction of the law and a perpetration of a fraud upon the Con-

stitution of the United States and the act of congress made pursuant thereto.

If the case of

Ker vs. Illinois, found in 119 U. S., at page 436,

is any authority in a case like the one at bar, then we are unable to comprehend what we think is the plain import of the English language.

Ker had been indicted, tried and convicted in the Criminal Court of Cook county. *During the proceedings connected with the trial* (and not before) he presented a plea in abatement. This plea in abatement, it is said, in the course of the decision, was "very full of averments, that the defendant protested and was refused any opportunity whatever from the time of his arrest in Lima until he was delivered over to the authorities of Cook county, *of communicating with any person, or seeking any advice or assistance in regard to procuring his release, by legal process or otherwise.*" All of which he alleged was a proceeding in *violation of certain treaty provisions* between the United States and Peru.

The decision proceeds to a discussion of the treaty provisions between the United States and Peru, and the opinion is made to hinge upon that matter, and that alone.

The court expressly refused to decide the question of his forcible seizure in another country and his transfer by violence and force and fraud, to this country, for the reason that neither the laws nor the Constitution, nor the treaties of the United States,

guarantee him any protection as against "a forcible seizure IN ANOTHER COUNTRY," and that is all that there is to the decision upon that subject.

Had he been forcibly seized *within this country*, by a fraud upon the law, participated in by the executive and prosecuting officers, it could not, and it would not have been said by this court that the Constitution afforded him no protection.

In passing, we should call the court's attention to the fact that there was nothing in the plea in abatement which in anywise stated that he could, or would have, availed himself of a writ of *habeas corpus*, had he had opportunity. The only averment was, that, by reason of his forcible arrest and his unlawful detention, he was prevented from communicating with friends.

But the case which is, perhaps, more relied upon than any other, for the high-handed proceeding resulting in the present detention of these defendants, is that of

Mahon vs. Justice, found in 127 U. S., at page 700; 32 L. Ed., 283.

That was a case where one who had committed a crime in the state of Kentucky, fled to the state of West Virginia. The one sought was unquestionably a fugitive within the meaning of the law, not as here, a man who was not within the jurisdiction when the alleged offense was committed. Requisition papers were duly obtained from the governor of Kentucky and duly placed before the governor of West Virginia. While the governor of West Virginia was considering the papers, demanding the requisi-

tion, certain private individuals, without warrant or authority of law of any kind or character whatsoever, forcibly kidnapped and forcibly removed the applicant for the writ from the state of West Virginia to the state of Kentucky. After arriving in which latter state, he was arrested, upon process issued on the indictments which had been found against him in Kentucky.

Mr. Justice Field who spoke for the majority of the court, there being no chief justice at that time, stated:

> "The only question, therefore, presented for our determination is whether a person indicted for a felony in one state, forcibly abducted from another, and brought to the state where he *was indicted, by parties acting without warrant or authority of law*, is entitled, under the Constitution or the laws of the United States, to release from detention under the indictment, by reason of such forcible and unlawful abduction."

You will observe that the court was very careful to state the precise question which it was deciding, and even upon that question, two of the most vigorous minds which have ever graced the bench of this court, took the liberty of dissenting.

What would Justice Field and the other members of the court have said if the defendant had been forcibly abducted and brought to the state where he was indicted upon a false affidavit, connived at by the executives of the two states purporting to act with warrant and authority of law? We shall see.

Speaking as to Kentucky upon the subject, Mr. Justice Field said:

> "The law of that state which is enforced, is a law for the punishment of the crime of murder and *she had merely sought to enforce it by her officers under process executed within her territory.* SHE DID NOT AUTHORIZE THE UNLAWFUL ABDUCTION OF THE PRISONER FROM WEST VIRGINIA."

Quoting from a North Carolina case, he said:

> "*But that was not the act of the state,* but of a few of its citizens, for which the Constitution of the United States has provided a reparation. It gives the governor of that state the right to demand them of the governor of this, and imposes on the latter the obligation to surrender them, but until it is refused, there can be no cause of complaint."

It will be observed that there was no cause of complaint against the executive officers *or* the prosecuting officer of the court claiming jurisdiction over the person of the defendants.

Quoting from another case he says:

> "The officers of the law take the requisite process, find the prisoners charged within the jurisdiction, *and this too, without force, wrong, fraud or violence on the part of any agent of the state or officer thereof.*"

That is the distinction between the Mahon case and the one at bar, which the majority of this court, speaking through Mr. Justice Field, had in mind. There can be no force, no wrong, no fraud and no violence on the part of any agent of the state or officer thereof. No governor can procure a false affidavit to be made, upon which to issue a requisition. No governor upon whom that requisition is made, knowing the falsity upon which it is founded, can further conspire to cause an arrest to be made at an unseemly hour, with the avowed determination of avoiding the writ of habeas corpus, or disobeying one, if it is issued, by the prevention of the service thereof, or otherwise.

Think of it. The adjutant general of the state of Colorado accompanied by a portion of the militia of that state, engaged in an act to set the courts of that state at defiance, if an attempt at jurisdiction by a writ of *habeas corpus* shall take place.

It would seem as though the court had in view that just such a question might arise as has arisen in this case. The ultra doctrine for which the court was willing to stand, was expressed in the Ker case and in the Mahon case, and two of the court fell by the wayside in the latter case. The doctrine was too much for them. The court had gone to greater lengths than they, as judges, were willing to go, and they express a hearty dissent, which must, upon re-examination, we think, meet with the approval of this court.

But, we concede that the Mahon case is good for all that was decided in it, and contend that this case is far beyond it.

If Mahon was kidnaped and carried into Kentucky, in the opinion of the minority, in plain violation of the Constitution of the United States, and is detained therein, in continued violation thereof, how much more is it true in the case at bar. Both Mahon and Ker were, as a matter of fact, fugitives from justice. Even as such fugitives from justice, however, they were not beyond the protection and the shield of the Constitution. A man is not an outlaw because he is a criminal; he is as much under the protection of the laws and as much within the folds of the Constitution and as much entitled to its shield as is the best and most deserving citizen in all the country.

In Ker vs. Illinois, cited supra, which we have said seems to have been borne in mind even by the majority of the court in the Mahon case, we find this language:

> "We do not intend to say that there may not be proceedings *previous to the trial* in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but *for mere irregularities* in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense, by persons without any warrant or without any previous complaint and brought before a proper officer, and this may be in some sense said to be 'without due process of law.'"

But, it would hardly be claimed that after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he should plead that he was first arrested without "due process of law." So here when found within the jurisdiction of the state of Illinois and liable to answer for a crime against the laws of that state *unless there was some positive provision of the Constitution* OR OF THE LAWS OF THIS COUNTRY VIOLATED, IN BRINGING HIM INTO COURT, it is not easy to see how he can say that he is there without "due process of law."

We say that both the Ker case and the Mahon case in effect decide that neither the executive, the judicial nor the legislative agencies of a state can by a conspiracy to avoid a right provided for by orderly and regular process, acquire a jurisdiction for the courts, which they would not otherwise have, even though such courts have jurisdiction of the offense. A court must not only have jurisdiction of the offense, but so far as it is concerned, it must acquire jurisdiction of the offender, without engaging in the violation of any law.

The prosecuting officer of this court lent himself to a scheme to secure jurisdiction of the persons of the defendants by palpable violation of the law, to wit, the taking of a false oath known by him to be false at the time of the taking of it, and the jurisdiction of the Canyon County District Court over the persons of the defendants to-day, depends upon, was acquired by and results through the taking of that false oath and not otherwise.

It does not follow that because no machinery of the law exists for restoring these prisoners to the state of Colorado, that therefore this court is powerless in the premises.

Mr. Justice Bradley in his dissenting opinion says that they should be enlarged and "given an opportunity to return to the state from which they were taken. It is not enough that the proceedings shall be regular *upon their face*. They must be regular as *a matter of fact*, and upon the question of the persons of the parties sought to be rendered within the demanding state at the time of the commission of the offense, the courts should always be open to a determination of that question."

In Munsey vs. Clough, cited supra, the proceedings were absolutely regular upon their face. They were not true as a matter of fact and the court says:

> *"When it is conceded or when it is so conclusively proved that no question can be made that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time in the demanding state, then the court will discharge the defendant."*

It remains to consider in this connection In re Moore, 75 Fed., 821.

That case was decided upon the court's understanding of the three cases which we have just analyzed. It is diametrically opposed to a court of like jurisdiction rendering the opinion in Tennessee vs.

Jackson, *cited supra*, and with all due deference to it, it did not understand nor comprehend, in our judgment, the points decided in those cases.

In that case, as in the case of Tennessee vs. Jackson, "*the governors of the two states were deceived by false affidavits and testimony furnished them*," and acting upon such fraud and deception in none of which did they participate themselves, a jurisdiction was obtained over the person, which would not otherwise have existed.

It is no authority in the case at bar for that reason. It is opposed to the case of Tennessee vs. Jackson and it does not correctly determine what was decided by this court in Cook vs. Hart, Mahon vs. Justice and Ker vs. Illinois.

If we have made it clear that the foundation of jurisdiction of the court of Idaho over the persons of these defendants is based upon a false affidavit made by the district attorney of Canyon county, we are prepared for the citation of authorities supporting the doctrine that:

> "No lawful thing, founded upon a wrongful act, can be supported."
>
> Ilsley vs. Nichols, 12 Pick. (Mass.), 270; 22 Am. Dec., 425.
>
> Luttin vs. Benin, 11 Mod., 50.

The Massachusetts court used this language:

> "These cases, therefore, seem to establish a general principle that a valid and lawful act can not be accomplished by any un-

lawful means, and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means, to his rights."

The employment of any subterfuge, scheme, enterprise, pretense or design, by which defendant is brought into the state for the purpose of arresting him must fail, *unless warranted by the laws of the land. This is familiar law.* The question does not depend upon the honest conviction of the persons engaged in the project, but upon the legality of the act. The rule is of ancient date and has been stated and acted upon in a variety of cases.

To the same effect is

Smith vs. Meyer, 1 T. & C. (N. Y.), page 665.

In re Alfred Largrave, 45 How. Prac., 301.

"The fact that the accused was brought by force or fraud within the jurisdiction of the country from which it was sought to extradite him, does not prevent his extradition at least *unless the prosecutor was a party to the scheme by which the accused was brought within the jurisdiction.*"

Volume 2, Whar. on Con. of Laws, section 849.

"To justify a magistrate in declining jurisdiction in extradition proceedings, upon

the ground that the accused was brought within the territorial jurisdiction by a trick or fraudulent device, *such trick or fraudulent device must be chargable to the prosecutor.* Ex parte Seitz, Rap. Jud. Quebec, 8 B. R., 392."

Wharton on the Conflict of Laws. Note to section 849.

"If a man is wrongfully brought into a jurisdiction, and there lawfully arrested, yet he ought to be discharged, *for no lawful thing founded upon a wrongful act can be supported.*"

In re Allen, 13 Blatchf., 271, volume 1, Fed. cases, 208.

Hooper vs. Lane, 6 H. L., case 443.

Hill vs. Goodrich, 32 Conn., 588.

In re Robinson, 8th L. R. A. (Neb.), page 398.

In re Walker, 61 Neb., 803.

Compton vs. Wilder, 40 Ohio St., 130.

Adriance vs. Largrave, 59 N. Y., 110.

Browning vs. Abrahams, 51 How. Prac., 173.

Kendall vs. Ailshire, 28 Neb., 707 (26 Am. St., 367.)

A fraud upon the law can never beget a legal proceeding, and this court has decided that the only lawful method by which the body of these defendants could have been obtained within the jurisdiction of

the state of Idaho was by virtue of section 5278 of the Revised Statutes of the United States, made under and pursuant to clause 2, section 2, of article IV of the Constitution.

Lascelles vs. State of Ga., 148 U. S., 537; 37 L. Ed., 549-552.

Judge Jenkins said the same thing in the Wisconsin case.

In re Cook, 49 Fed., 833-841.

It was also there decided that the right to one's personal liberty does not depend upon the arbitrary will of any person whomsoever. (See page 839.)

That jurisdiction of the offense and jurisdiction of the offender are different things, and that one may exist without the other. See

Adams vs. People, 1 N. Y., 173.

In ex parte Reggel, 114 U. S., 642; 29 L. Ed., 250, this court held that a defendant in extradition had

> "the right to insist upon proof that he was within the demanding state at the time he is alleged to have committed a crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process."

When, under the admitted allegations of this petition, standing as an answer to the return, have we had a chance to exercise that right which this great court says we are entitled to exercise?

These arrests and detentions violate the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Whatever applicability the fourth and fifth amendments may or may not have under the decisions of this court, what we have there said is reiterated with emphasis here without further discussion and in addition thereto we desire to argue further, that what has been done in the cases of Moyer, Haywood and Pettibone, by the authorities of the state of Colorado and the state of Idaho, *has resulted in a denial to them of the equal protection of the laws.*

No one ever heard before of the chief executive officers of two great states, entering into a conspiracy to prevent the jurisdiction of a court attaching to her citizens so as to determine a question upon which the liberty and perhaps the lives of such citizens depend.

We know that it will be urged in this connection that these defendants are regularly indicted within the state of Idaho and that they will be regularly tried in that state, and we have no desire at this time to go outside the record upon the question of the regularity of this indictment. The record discloses that the same prosecuting attorney's name is signed to the indictment who wilfully perjured himself in the affidavit upon which the requisition pro-

ceedings were based. We know that this case must be decided upon the record, and we therefore refrain from any comments upon the manner by which this indictment was procured, or upon those who instigated it, and are responsible for it. Animadversion upon these matters will receive due attention at the proper time and in the proper place. But, the spirit of the law is, that no man shall be dragged from his home and removed 1,500 miles or more to a distant state, there to answer for the commission of an offense which took place at a time when he was confessedly not present, when no lawful means existed by which his extradition could be secured, except by the perpetration of a fraud upon the law. Far better even if every charge contained in the indictment be true, that the majesty of the law should be upheld, than that any particular man be punished, even though he be guilty of the crime charged.

In the language of the Supreme Court of North Carolina in State vs. Hall, 115 N. C., 811; 28 L. R. A., 289-292:

> *"Were the courts without any semblance of right to supply the legislative omission, it would be a criminal usurpation of an authority more pernicious to the public interest than the escape of not two, but scores of criminaals. Appellate courts can not deliberately legislate for the punishment of crime without incurring a moral accountability as grave as that of the criminal who suffers by the usurpation."*

Lay aside the presumption which obtains, that these men are innocent until they are proven guilty. Admit, for the purpose of the argument that the offense charged raises a presumption that they are guilty until they prove themselves innocent, nevertheless it has required a breach of the law upon the part of the governors of two states in order to secure the jurisdiction of the Idaho courts over their bodies. We can deal with those who violate the law, as private citizens, but when those who are sworn to execute the laws deem it their duty to violate them, we have a condition which confronts us which will result in chaos. We have all seen the effect which has followed the decisions of a weak court, lending itself politically to the aid of those who elevated the judges to power, and we have seen and experienced the utter and hopeless condition which has resulted, when the turn of the tide has compelled the same court to ignore, override and repudiate its own decisions. The law was and is, that no lawful extradition could have been granted in the case of these men. An unlawful extradition was ganted, one which the Supreme Court of Idaho in its decision admits was only conformable to the law in manner of form while violative of its substance. The decision of the Supreme Court of Idaho, we are sure, will shock the sense of justice and of right in the bosom of every member of this court. It is not founded upon authority, as we have shown, and it ignores a foundation principle of natural justice embraced in every Constitution which has ever been written by English freemen, namely, that a man's personal liberty is sacred, unless that liberty is ter-

minated in strict accord with the law. It is, of course, wrong that one should kill his fellow man, but it is infinitely worse that organized society in the name of the law should kill a man because he is supposed and is charged to have killed another, and the law protects the person so charged as against the act of any officer of the law, unless that officer can put his finger upon the sentence which authorizes his procedure and unless he can show an exact and literal conformity with such authorization.

The Fourteenth Amendment forbids any arbitrary deprivation of liberty.

In re Converse, 137 U. S., 624; 34 L. Ed., 796-9.

Hodgson vs. State of Ver., 168 U. S., 262; 42 L. Ed., 461-64.

That the arrest, detention and imprisonment of these prisoners was brought about by, and resulted solely from, a wilful, premeditated and deliberate violation of the Constitution of the United States and the act of congress, and that the jurisdiction of the courts of the state of Idaho over the persons of these defendants has been acquired by and is founded upon the result of that conspiracy, violation and fraud, is admitted by the demurrer in this case.

There remains, therefore, for discussion, only one proposition, and that is, whether the Supreme Court of the United States will grant the relief which has been denied by the Supreme Court of the state of Idaho and the Circuit Court of the United States sitting in and for the state of Idaho.

This court has asserted, over and over again, that upon it devolves the duty of maintaining the majesty and the authority of the federal Constitution and the laws made in pursuance thereof, and that, although a fugitive is restrained, under authority derived from the Constitution of the United States, he is not in the custody of or under restraint by an officer of the United States, and therefore, state courts have concurrent jurisdiction with federal courts, to determine, by writ of habeas corpus, the validity of his imprisonment.

The duty of both courts is to exercise such jurisdiction. The question is one arising under the Constitution and laws of the United States, and the prisoners have the right to the independent judgment of the federal courts upon the subject of their detention. The federal courts have sometimes required the prisoner to await the action of the state courts upon the theory that the state courts were as likely to administer the law as were the courts of the United States, and they have sometimes withheld relief on writs of habeas corpus, and required defendants, who were convicted, to sue out writs of error, *but they have never denied the authority of the federal courts in the premises.*

Robb vs. Connolly, 111 U. S., 624.

Roberts vs. Riley, 116 U. S., 80.

Some of the lower federal decisions upon this subject are as follows:

Bruce vs. Runyan, 124 Fed. Rep., 481.

Ex parte Hart, 63 Fed., 249; 28 L. R. A. 801.

In re Roberts, 24 Fed., 132.
Ex parte Brown, 28 Fed., 653.
Ex parte Morgan, 20 Fed., 298.
Ex parte Robb, 19 Fed., 26.
In re Doo Woon, 18 Fed., 898.
Ex parte McKean, 16 Fed. cases, No. 8848.

We have sought the writ of habeas corpus at the first place and the first moment obtainable. We have invoked and exhausted the jurisdiction of the state courts on that subject. The Supreme Court of Idaho has rendered its final decision and has filed its final opinion upon the right of our detention, which opinion is as controlling and as unlimited as it would be if it had been rendered after judgment and sentence.

We have invoked the aid of the federal court, sitting in and for the state of Idaho, and our writ has been quashed on hearing of a motion and demurrer attacking the return. We are without any manner of remedy, in any way, shape or form, except in this tribunal, and under the circumstances of this case, the time to take jurisdiction is now. The circumstances warrant it, and the decisions of this court uphold it, as was said by this court in the case of

Allen vs. Georgia, 166 U. S., 138; 41 L. Ed., 949.

The deprivation of a right which is indispensable to the liberty of every citizen justifies federal interference. If this high-handed proceeding can be carried to an end under the sanction of the decision of the Supreme Court of Idaho and of the Circuit Court

of the United States, sitting in and for that state, the liberty of no man on this continent in this country, is safe. A dastardly scoundrel in the state of California can, with two complaisant governors, drag a citizen of Massachusetts or of New York, to that state, three thousand miles away from his home, and place him on trial for any charge that he has the audacity to concoct or conceive.

Under these decisions, the guaranties of the Constitution as to personal liberty, unreasonable seizure, due process of law and the equal protection of the laws, are myths and snares. One does not walk in the broad light of day, if these opinions are correct, under the protection of the solemn compact which forms the basis of this government, but rather, each one holds the liberty of his person at the will and the whim of any villian, or any set of villians, who are temporarily entrusted with the execution of our laws.

In this case we have done each and every one of those things before invoking the aid of this court, which were suggested to be done, in

> Whitten vs. Tomlinson, 160 U. S., 231; 40 L. Ed., 406.

We know that habeas corpus can not usurp the functions of a writ of error, but habeas corpus is pre-eminently the writ on which to test jurisdiction, not error within jurisdiction. A fatal defect in jurisdiction itself is the question presented by this record.

> Felts vs. Murphy, decided March 12, 1906, by this court, No. 533, not yet officially reported, but printed in advance sheet No. 10 of the L. Ed., page 366.

Valentina vs. Mercer, No. 404, decided by this court March 12, 1906, 10th Adv. sheet, page 368.

Whitney vs. Dick, No. 557, decided by this court April 30, 1906, 13th Adv. sheet, 584.

Wood vs. Brush, 140 U. S., 278; 35 L. Ed., 505.

Whatever the usual rule may be, it has recently been held that special circumstances authorize a departure from it.

In re Lincoln, dec. May 14, 1906; 14 Adv. Sheet, 602.

Where the authorities seem to have been very fully collected and cited by Justice Brewer, speaking for the court. Certainly if there ever was a case with special circumstances attendant upon it, we are now confronted with such a case.

The only ground of escape from a present decision herein will be that it lies within the power of the court to put us to a writ of error in case of a conviction.

We believe that that power lay exclusively with the federal court of Idaho, as it would have lain with this court, if the original application had been made here. In any event, the appeal does not present that question. The decision appealed from was one which quashed the writ and remanded the prisoner to custody, based on the motion and the demurrer. The Circuit Court of Idaho did not attempt to exercise the discretion which it might have claimed, to have waited until a final determination on the merits of the case,

by the courts of the state of Idaho. The majesty of the law, the authority of the national Constitution and the enactment of congress require vindication in these cases at the hands of this court, and confidently relying upon such vindication we submit this case.

It is but proper to say that, in the preparation of this brief the Hon. Fred Miller, of Spokane, a member of the bar of the Supreme Court of the states of Washington and Idaho, and the Hon. John F. Nugent, of Boise, Idaho, a member of the bar of the Supreme Court of the state of Idaho, have contributed no unimportant part, and the only reason that their names are not attached hereto as counsel, is because they have not yet been admitted to practice in this court.

We ask and we believe that the action of the Supreme Court of the state of Idaho and of the Circuit Court of the United States sitting in and for the state of Idaho, will be reversed, and that they will be directed to sustain the writs and direct the release of the prisoners, with an opportunity to them of returning to the state from which they were kidnapped by the conspiracy, confederation and agreement of the governors of the states of Idaho and Colorado, acting in conjunction with each other, for the overthrow and in avoidance of a provision of the Constitution of the United States and an act of congress made pursuant thereto.

Respectfully submitted,

JOHN H. MURPHY,
CLARENCE S. DARROW,
EDMUND F. RICHARDSON,
Counsel for Appellants and
Plaintiffs in Error.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO.

IN RE CHARLES H. MOYER.

February Term, 1906. Filed April 14, 1906. Sol Hasbrouck, Clerk.

HABEAS CORPUS—INTERSTATE EXTRADITION—ILLEGAL RENDITION—HOW AND WHEN CAN BE QUESTIONED—MANNER OF ARREST—MOTIVES FOR ISSUANCE OF EXECUTIVE WARRANT—FUGITIVE FROM JUSTICE JURISDICTIONAL QUESTION—DETERMINATION QUASI JUDICIAL—WHEN CEASES TO BE FEDERAL QUESTION.

1. Where the accused is personally within the jurisdiction of the demanding state and there applies to the court for his discharge on habeas corpus, he can not raise the question as to whether or not he has been, as a matter of fact, a refugee from the justice of that state within the meaning of the federal Constitution and the act of congress authorizing interstate extradition.

2. The action and conduct of the chief executive of the state in which the accused was found in issuing

the executive warrant and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the reviewing authority of the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state.

3. The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become *functus officio* as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for judicial inquiry on application by the prisoner for his discharge, where he is at the time, held under due and legal process issued out of a court of competent criminal jurisdiction of the demanding state.

4. The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government.

5. The fact that a wrong has been committed against a prisoner in the manner or method pursued in subjecting his person to the jurisdiction of a state, against the laws of which he is charged with having transgressed, can constitute no legal or just reason why he should not answer the charge against him, when brought before the proper tribunal. The com-

mission of an offense in his arrest does not expiate the offense with which he is charged.

6. The jurisdiction of a court in which an indictment is found or an accusation is lodged is not impaired by the manner in which the accused is brought before the court.

7. In interstate extradition the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention.

8. Returns of the officer and answer of the prisoner examined and considered in this case, and, *held*, that the prisoner is being detained under process duly and regularly issued by a court of competent criminal jurisdiction, and that he is not entitled to a discharge on habeas corpus.

(Syllabus by the Court.)

Application of Charles H. Moyer for a writ of habeas corpus. Writ issued and case heard and considered on the return and supplemental return of the officer and the answer of the prisoner, after which writ is quashed and the prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent and Edmund F. Richardson for the petitioner.

John J. Guheen, attorney general; Owen M. Van-Duyn, prosecuting attorney of Canyon county, and

James H. Hawley, W. E. Borah and W. A. Stone for the state.

AILSHIE, J.

The prisoner, Charles H. Moyer, applied to this court through his counsel, for a writ of habeas corpus requiring E. L. Whitney, warden of the state penitentiary, to produce the body of the prisoner at a time and place to be designated by the court, and to make true return of the cause or causes of his detention. A writ was thereupon issued and the warden, at the time designated, produced the body of the prisoner in court and made return that he was detaining him under order of the probate judge of Canyon county and for that purpose as the agent of the sheriff of Canyon county. The return contains a certified copy of the order made by the probate judge, wherein it recites that the Canyon county jail is an unfit place for the detention of the prisoner and orders and directs that he be temporarily detained in the state penitentiary at Boise City. The return further shows that on the 12th day of February, 1906, a complaint duly verified by Owen M. VanDuyn, prosecuting attorney in and for Canyon county, was filed with M. I. Church, probate judge of that county, charging the prisoner, Charles H. Moyer,with the crime of murder committed at Caldwell, Canyon county, on the 30th day of December, 1905. The return also shows that on the same date a warrant of arrest was duly issued out of the Probate Court of Canyon county for the apprehension and detention of the accused. The return endorsed on the warrant and made by the sheriff of Canyon county shows that the prisoner was on

the 21st day of February, 1906, arrested and taken before the court. It is further shown that at the time of making the return the grand jury of Canyon county was in session and that the prisoner was held subject to the order of the Disrtict Court in and for Canyon county and that he had been from time to time, by order of the court, taken into court to be present at the impanelling of the grand jury. Before the final hearing on the return to this writ, the warden made a supplemental return to the effect that on the 7th day of March, 1906, the grand jury in and for Canyon county found a true bill of indictment against the prisoner, charging him with the commission of the crime of murder, at Caldwell, in Canyon county, on the 30th day of December, 1905, and that the indictment was thereupon duly filed in court, and that thereupon a bench warrant issued for the arrest of the accused Charles H. Moyer, and that the same was served, and the prisoner was thereafter on the 9th day of March, arraigned before the court and the time for pleading to the indictment was fixed for March 16th; and that the prisoner was thereafter by the sheriff of Canyon county returned to the state penitentiary and temporarily placed in charge of the warden thereof for detention and is now held under such authority. The petitioner answered the return and supplemental return made by the warden, admitting all the material and essential facts contained in the return; he also pleaded further, separate and independent matter for the purpose of showing that his imprisonment and detention was illegal and ulawful. While quite voluminous, the substance of this additional and independent matter contained in

the answer is, that the petitioner is a citizen of the United States and of the state of Colorado, residing in the city and county of Denver, and that he has never been within the state of Idaho at any time since the 26th day of October, 1905, and that he was not in the state of Idaho on the 30th day of December, 1905, and was not a fugitive from the justice of the state of Idaho within the meaning of the federal Constitution and the act of congress providing for interstate extradition, and that he was wrongfully and unlawfully removed from the state of Colorado to the state of Idaho in pursuance of an unlawful combination and conspiracy entered into between the governors of the states of Idaho and Colorado, and the prosecuting attorney of Canyon county; that the governor of Colorado wrongfully and unlawfully honored the requisition of the governor of Idaho and wrongfully issued his warrant and order for the arrest of the prisoner by the authorities of the state of Colorado, and that the prisoner was neither given time nor opportunity to apply to either the state or federal courts for his discharge prior to his delivery to the authorities within the jurisdiction of the state of Idaho. Counsel for the state moved to strike from the answer of the petitioner all matters leading up to and involving the extradition of the petitioner on the ground that the same is sham and irrelevant matter. After hearing exhaustive argument this motion was sustained and it was announced from the bench at the time that a written opinion would thereafter be filed setting forth the views of the court on the questions presented.

It is proper to first observe that the extradition proceedings and process by and under which the prisoner was brought into this state appear in all respects regular and in due form.

With the foregoing statement of the case we will pass at once to a consideration of the questions of law involved.

We are of the opinion that after the prisoner is within the jurisdiction of the demanding state and is there applying to its courts for relief, he can not raise the question as to whether or not he has been, as a matter of fact, a fugitive from the justice of the state within the meaning of the federal Constitution and the act of congress. A careful and diligent examination of the many authorities touching upon this subject and the reasons that exist for invoking the aid of the writ in such cases, convince us that the question as to whether or not a citizen is a fugitive from justice is one that can only be available to him so long as he is beyond the jurisdiction of the state against whose laws he is alleged to have transgressed. It is a remedy which does not go to the merits of the case and does not involve the inquiry as to whether or not he is in fact guilty or innocent of the offense charged. It is a remedy that merely goes to the question of his removal from the jurisdiction in which he is found to the jurisdiction against the laws of which he is charged with offending. If these views be correct, and we believe they are, it follows that so soon as the prisoner is within the jurisdiction of the demanding state, both the reason and object for invoking this principle of law have ceased and can no longer have any application. It has been held that

it ceases to be a federal question so soon as the prisoner invokes its aid within the state from which he is alleged to have fled. (In re Cook, 49 Fed., 841.) It must also necessarily follow that the courts of the state demanding the prisoner have no jurisdiction to inquire into the acts of the executive of the state delivering the prisoner. The action and conduct of the chief executive of the state in which the prisoner was found and of all the executive and ministerial officers acting in aid of his warrant is a matter for the consideration of the courts of this state, subject to the reviewing authority of the federal courts in so far as the federal question is involved. The warrant of the chief executive of the state surrendering the prisoner, whether issued lawfully or unlawfully, has accomplished its purpose and becomes *functus officio* so soon as the prisoner is delivered into the jurisdiction of the demanding state and its validity and the regularity of its issuance thereupon cease to be questions open to the consideration of the courts of the demanding state.

The prisoner was regularly charged with the commission of a crime in Idaho and against her laws. The governor of Colorado honored the requisition from the governor of Idaho and thereupon duly and regularly issued his warrant for the arrest and surrender of the accused to the agent of the state of Idaho. This action of the Colorado governor was at least *quasi judicial* (In re Cook, 49 Fed., 841); it amounts to a determination that the accused was substantially charged with the commission of a crime and was a fugitive from justice. (Roberts vs. Reilly, 116 U. S. 80; 29 L. Ed., 544; Cook vs. Hart, 146 U. S.,

163; 36 L. Ed., 934.) The motives which prompted the governor of a state to take such action or make such determination are not proper subjects of judicial inquiry. Such inquiry would be opposed both to the plainest principles of public policy and the freedom of action by the executive within the constitutional authority of that department of government. Jurisdiction to take the action complained of is the test, and the jurisdictional facts are subject to review by the federal courts and courts of of the surrendering state where they are applied to before the state whose laws it is charged have been violated acquires jurisdiction of the person of the accused. In the latter case the object has been accomplished and as has been held in several cases, there is no process or authority for returning the prisoner to the state in which he was found. (Mahon vs. Justice, 127 U. S., 700; 32 L. Ed., 283, approved in Cook vs. Hart, 146 U. S., 183; 36 L. Ed., 939; In re Moore, 75 Fed., 834.)

One who commits a crime against the laws of a state, whether committed by him while in person on its soil or absent in a foreign jurisdiction and acting through some other agency or medium, has no vested right of asylum in a sister state. (Mahon vs. Justice, supra; Lascelles vs. Georgia, 148 U. S., 543; 37 L. Ed., 551; Ker vs. Illinois, 119 U. S., 436; 30 L. Ed., 421; In re Moore, 75 Fed., 824), and the fact that a wrong is committed against him in the manner or method pursued in subjecting his person to the jurisdiction of the complaining state and that such wrong is redressible either in the civil or criminal courts, can constitute no legal or just reason why he him-

self should not answer the charge against him when brought before the proper tribunal. The prisoner does not represent in his person the sovereignity of either the damanding or surrendering state and is in no position to speak for either; on the other hand, if any offense was committed in course of his rendition it was clearly an offense against the laws of one or both of those states; but neither state is here complaining. (People vs. Pratt, 78 Cal., 349; 20 Pac., 733.)

No case has been called to our attention, and, in fact, we have been unable to find any instance where the prisoner has alleged as a ground for his discharge a like state of facts to those set up in the answer in this case and to which the motion is here directed. We have, however, examined several authorities in which the same course of reasoning adopted by the courts, in holding that the prisoner should not be discharged, is equally, and as logically, applicable to the facts of this case.

Prof. Peabody, sometime lecturer on criminal law before the Harvard Law School, in his text on Interstate Extradition, at page 99, 19 Cyc., states the general principle touching the rights of prisoners illegally brought into a jurisdiction as follows: "It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended, he is not protected from the prosecution even if he is kidnapped in the other state and brought into the state without a semblance of right. It follows therefore that he is not wronged by being subjected to its juris-

diction, although the requisition proceedings were not strictly legal. As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state. The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors that they in turn may be prosecuted by it."

In Mahon vs. Justice, supra, a case in which a controversy arose between the states of West Virginia and Kentucky over the kidnapping of the prisoner Mahon from the state of West Virginia, Justice Field, after stating the nature of the controversy, said:

> "The only question, therefore, presented for our determination is whether a prisoner indicted for a felony in one state, forcibly abducted in another state, and brought to the state where he was indicted by parties acting without warrant or authority of law, is entitled under the Constitution or laws of the United States to release from detention under the indictment by reason of such forcible or unlawful abduction."

In passing upon the question thus stated, that distinguished jurist said:

> "As to the removal from the state of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution, which declares that 'a person charged in any state

with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime,' and the laws passed by congress to carry the same into effect—it is not perceived how that fact can effect his detention upon a warrant for the commission of a crime within the state to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer."

The opinion closes as follows:

"So in this case we will say that, whatever effect may be given by the state court to the illegal mode by which the defendant was brought from another state, no right, secured under the Constitution or laws of the United States was violated by his arrest in Kentucky and imprisoned there, upon the indictment found against him for murder in that state."

In re Cook, supra, the United States Circuit Court had under consideration the validity of an extradition granted by the governor where the party in fact had not been in the demanding state at the time the offense was committed, and the court, speaking of the validity of the executive warrant, said:

"His warrant, unassailed by competent authority, is complete justification for the arrest and surrender of the alleged fugitive. When so delivered by virtue of such warrant, his surrender is lawful, and the demanding state obtains rightful possession of his person, and may lawfully subject him to its criminal process for the offense charged. The executive warrant has then spent its force. It is no longer operative. The alleged offender is no longer subjected to deprivation of liberty by virtue thereof, but is rightfully held under the process of the state. When that has happened, no federal question remains. * * * The fact of flight may be in a sense jurisdictional to removal, as one says a criminal court has jurisdiction only of crime. But such court has jurisdiction to determine whether a certain act charged to have been committed is or is not a crime. Its decision therein, although erroneous, is not void. So here the jurisdiction to determine the fact of flight is lodged with the executive. He has jurisdiction of the subject-matter. His warrant is valid until his determination of the fact of flight is properly reversed. When, therefore, such valid warrant has been executed, the surrender thereunder is lawful, and the party lawfully subjected to the state jurisdiction."

The latter case was appealed to the Supreme Court, and in Cook vs. Hart, 146 U. S., 183; 36 L. Ed., 934, the lower court was affirmed, and Justice

Brown who wrote the opinion on appeal made the following observation:

> "It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering state, it is presented in a very different aspect after the accused has been delivered over to the agent of the demanding state, and has actually entered the territory of that state, and is held under the process of its courts."

In ex parte Johnson, 167 U. S., 120; 42 L. Ed., 103, the court made the distinction between the service of civil process and that of criminal process where the party had been wrongfully brought into the jurisdiction, and said:

> "Indeed, there are many authorities which go to the extent of holding that in criminal cases a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense and presents no valid objection to his trial in such court. * * * The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest."

To the same effect, see: Dow's Case, 18 Pa. St., 37; Ex parte Ker, 18 Fed., 167; State vs. Smith, 19 Am. Dec., 697; 12 A. & E. Ency. of Law, 607; Eaton vs. West Virginia, 91 Fed., 760; Kingen vs. Kelley, 3 Wyo., 571; 28 Pac., 38; 15 L. R. A., 177; Ex parte Barker, 13 Am. St. Rep., 17; 87 Ala., 4; 6 So., 80; State vs. Ross, 21 Iowa, 467; State vs. Patterson, 116 Mo., 505; Bookin vs. The State, 26 Tex. App., 121; 9 S. W., 737; State vs. Glover, 112 N. C., 896.

Counsel for petitioner lay much stress on the proposition that neither an individual nor the state can be allowed to gain an advantage by means of an unlawful or wrongful act. That proposition is true, but to gain an advantage means to obtain a superiority of position or opportunity which would not appear to have been done in such a case as this, admitting all the facts charged to be true. Where the state accuses a person of the commission of an offense against its laws, the mere apprehension of the accused, although in an unlawful manner, and subjecting him to the jurisdiction of the courts to answer the charge can not amount to a legal advantage any more than if the accused had voluntarily surrendered himself to the authorities. The wrongful or unlawful means employed in making an arrest, however criminal they might be, could not be chargeable to the sovereignty, which can commit no crime, but would be the crime of the individual who committed the act, and would furnish no reason or justification for discharging the prisoner when brought before the court. If, therefore, a crime should be committed by any person in abducting, apprehending or arresting the accused, such person may be held to answer in

the proper jurisdiction for the commission of the offense. But the commission of the latter offense does not expiate the former.

Numerous authorities are cited on behalf of petitioner to the effect that a lawful rendition can not be had of one who was not in fact within the demanding state when the offense is charged to have been committed. The latest and highest authority that has been brought to our attention on this phase of the case is Hyatt vs. New York, 188 U. S., 691; 47 L. Ed., 657; s. c., 172 N. Y., 176; 64 N. E., 825. As we have heretofore said, the question as to whether or not the prisoner was in fact a refugee from justice can not arise at this time in the case at bar. Except for the construction placed on the second clause of section 2, of the fourth article, of the Constitution of the United States, and section 5278, U. S., Revised Statutes, by the highest court of the land, we should undoubtedly incline to the belief that they were designed and intended to authorize the extradition of any person who has offended against the laws of one state and is thereafter found in another state. It would seem that by the language: "Who shall flee from justice," is rather meant a flight from a punishment—a penalty or condition which would follow capture and conviction—than a flight from a *place* or the *territorial limits* of the outraged commonwealth. The pursuing hand of justice demanding vindication and vengence is a much stronger inducement to flight than the mere discomforts of place or the horrors or dislike of state lines. While the belief just expressed is the unanimous view of this court as to the real purpose and intent of the extradition clause

of the federal Constitution, it amounts to the merest observation in this case and in no respect influences its decision. We are not unmindful of the fact that the almost uniform current of authority, both federal and state, is to the effect that the flight must be from a *place*, namely, from the *territorial limits* of the state demanding the prisoner. It is worthy of note, however, that under that line of authority, as was suggested on the argument of this case, an assassin on the Oregon bank of the great waterway that marks our western boundary might, by firing across the stream, murder numbers of our citizens and be exempt from extradition and go free from punishment. In this respect the views expressed by Mr. Justice Clark in the extraordinary case of State vs. Hall, 28 L. R. A., 293; 115 N. C., 811, are worthy of consideration.

Counsel place considerable stress on In re Robinson, 8 L. R. A., 398, a case where the Supreme Court of Nebraska ordered a prisoner discharged because he had been forcibly brought into the state without requisition process. That case does not meet the facts of the case at bar; besides, it seems to rest on the rule adopted in civil cases rather than that applied to criminal cases. The statement there made as to the current of authority on the question of interstate extradition leaves it open to the criticism that it is not a sound or carefully considered case. In fact, the weight of authority is entirely the other way, as will be seen from an examination of Lascelles vs. State of Georgia, 148 U. S., 537; 37 L. Ed., 552; Lascelles vs. The State, 90 Ga., 347; see 11, Rose's Notes (U. S.), page 239; s. c., 35, Am. St. Rep., 220; 16 S. E., 946.

The motion having been sustained, the case remains here on the answer of the warden, which is admitted to be true. The prisoner has been indicted on the charge of murder; and for the purposes of this case, whether as a principal or accessory, is immaterial under our statute (sections 7697 and 7698, R. S., and Territory vs. Guthrie, 2 Idaho, 432; as is also the question as to whether he was within or without the state at the time of the alleged commission of the offense (sections 6331 and 7481, R. S.). The proceedings appear regular on the face of the returns, and in conformity with the laws of this state, and since the prisoner is being held under process duly and regularly issued by a court of competent criminal jurisdiction, we are commanded by statute to remand him to custody. The writ is quashed and the prisoner is remanded to the custody of the officer.

Stockslager, C. J., and
Sullivan, J., concur.

IN THE SUPREME COURT OF THE STATE OF IDAHO.

IN RE WILLIAM D. HAYWOOD.

February Term, 1906. Filed April 14, 1906. Sol Hasbrouck, Clerk.

Application of William D. Haywood for a writ of habeas corpus. Writ issued and case heard and considered on the return and supplemental return of the officer and the answer of the petitioner. Writ quashed and prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent and Edmund F. Richardson, for the petitioner.

John J. Guheen, attorney general; Owen M. Van-Duyn, prosecuting attorney of Canyon county, and James H. Hawley, W. E. Borah and W. A. Stone for the state.

Per Curiam:

The facts in this case are substantially the same as In re Moyer just decided by this court, and upon the authority of that case and for the reasons therein stated, the writ is quashed and the prisoner remanded to the custody of the officer.

IN THE SUPREME COURT OF THE STATE OF IDAHO.

IN RE GEORGE A. PETTIBONE.

February Term, 1906. Filed April 14, 1906. Sol Hasbrouck, Clerk.

Application of George A. Pettibone for a writ of habeas corpus. Writ issued and cause heard and considered on the return and supplemental return of the officer and the answer of the petitioner. Writ quashed and prisoner remanded to the custody of the officer.

Fred Miller, John F. Nugent and Edmund F. Richardson for the petitioner.

John J. Guheen, attorney general; Owen M. Van-Duyn, prosecuting attorney of Canyon county, and James H. Hawley, W. E. Borah and W. A. Stone for the state.

Per Curiam:

The facts in this case are substantially the same as In re Moyer just decided by this court, and upon

the authority of that case and for the reasons therein stated, the writ is quashed and the prisoner is hereby remanded to the custody of the officer.

IN THE SUPREME COURT OF THE STATE OF IDAHO.

IN RE CHARLES H. MOYER. Habeas Corpus.

February Term, 1906.

I, Sol Hasbrouck, clerk of the Supreme Court of the state of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion in the above entitled cause, on the 14th day of April, A. D. 1906, and now on file in my office.

Witness my hand and the seal of the court this 23d day of July, A. D. 1906.

SOL HASBROUCK,
Clerk.

(Seal)

By E. H. HASBROUCK,
Deputy Clerk.